No. 89-1818

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DAVID I. SMITH,

Petitioner,

v.

ROBERT MCDONALD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

WILLIAM WOODWARD WEBB
BROUGHTON, WILKINS
& WEBB, P.A.
P.O. Box 2387
Raleigh, NC 27602
(919) 833-2752
Counsel for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

I. Whether the decision of the Fourth Circuit Court of Appeals is entitled to review under Rule 10 of the Rules of the Supreme Court?

II. Whether the Fourth Circuit Court of Appeals erred in reversing the judgment of the District Court by concluding that the respondent's written communications to the president-elect (and later president) concerning a potential candidate for the position of United States Attorney were absolutely privileged under the common law of North Carolina?

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BRIEF IN OPPOSITION

TO THE HONORABLE WILLIAM H. REHNQUIST, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES.

Respondent, ROBERT McDONALD (hereinafter "Respondent" or "McDonald"), respectfully prays that the Petition for Writ of Certiorari filed by Petitioner, DAVID I. SMITH (hereinafter "Petitioner" or "Smith"), be denied. In support of his position Respondent respectfully shows that:

OPINION BELOW

A copy of the decision of the Fourth Circuit Court of Appeals in this case, *David I. Smith v. Robert McDonald*, 895 F.2d 147 (4th Cir. 1990), is attached as Exhibit A to the Petition. A copy of the Fourth Circuit's panel decision denying rehearing, *David I. Smith v. Robert McDonald*, No. 89-1401 (4th Cir. Feb. 28, 1990), is attached as Exhibit H to the Petition.

JURISDICTION

The Petition for Writ of Certiorari should be denied because (1) the decision rendered by the Fourth Circuit in this matter does not conflict with the decision of another federal court of appeals on the same matter; (2) the Fourth Circuit's decision does not conflict with that rendered by a state court of last resort; and (3) the Fourth Circuit's decision does not represent a departure from the accepted and usual course of judicial proceedings. Moreover, there is no special or important reason for granting the Petition. See Sup. Ct. R. 10.

STATEMENT OF THE CASE

On July 24, 1981, the Petitioner, David I. Smith, an unsuccessful candidate for the office of United States Attorney for the Middle District of North Carolina, commenced a common law libel action against the Respondent, Robert McDonald, seeking one million dollars in compensatory and punitive damages because of allegedly defamatory statements, made during Smith's campaign, regarding his qualifications for that position. The statements were contained in two private letters (dated December 1, 1980 and February 13, 1981) from McDonald to President Reagan with copies to only three other high public officials.[1]

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[1] Notwithstanding the Petitioner's repeated unsupported assertions to the contrary, these letters were sent by the Respondent

This action was originally filed in the Superior Court of Alamance County, North Carolina, but subsequently, on August 25, 1981, was removed to the United States District Court for the Middle District of North Carolina. In an Order and Memorandum Opinion dated March 19, 1982, the District Court denied McDonald's motion to dismiss and Smith's motion to remand the case to state court.

Thereafter, the District Court, on April 28, 1983, denied McDonald's motion for judgment on the pleadings, ruling that the alleged libelous communications were not entitled to an absolute privilege under the "Petition Clause" of the First Amendment to the United States Constitution. *Smith v. McDonald*, 562 F.Supp. 829 (M.D.M.C. 1983). McDonald appealed to the Fourth Circuit which affirmed the District Court. *Smith v. McDonald*, 737 F.2d 427 (4th Cir. 1984). The United States Supreme Court, on June 19, 1985, affirmed the decision of the Fourth Circuit, and the case was remanded to the District Court. *McDonald v. Smith*, 472 U.S. 479 (1985).[2]

On March 5, 1987, the District Court denied McDonald's motion for summary judgment, and the case proceeded to trial by jury on May 16-20, 1988. On May 20, 1988, the jury returned a verdict for Smith in the amount of two hundred thousand dollars ($200,000.00), of which one hundred fifty thousand dollars ($150,000.00) were punitive damages. On August 25, 1988, the Court denied McDonald's post-trial motions.[3]

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only to Mr. Reagan, Edwin Meese, Senator Jesse Helms and FBI Director William Webster.

[2] Both the Fourth Circuit and this Court focused the inquiry solely on the constitutional question presented; i.e., whether the Petition Clause of the First Amendment provides absolute immunity to a defendant charged with libel of a political figure.

[3] Strikingly, the Petitioner has failed to mention in his discussion of the jury verdict that by virtue of the rulings on the Respondent's

The subsequent appeal of the Fourth Circuit, filed on September 20, 1988, addressed, *inter alia*, whether the Respondent was entitled to an absolute privilege under the common law of North Carolina. On February 2, 1990, the Fourth Circuit reversed the judgment of the District Court, holding that the Respondent's communications were absolutely privileged under North Carolina common law. *Smith v. McDonald*, 895 F.2d 147 (4th Cir. 1990).

The Petitioner's petition for rehearing and petition for rehearing en banc were both denied on February 28, 1990 (Petition Appendix H). From these decisions the Petitioner seeks the review of this Court.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari presents no special or important reason for this Court to review the decision of the Fourth Circuit. Moreover, it is not in conflict with the decision of another United States appellate court on the same matter; it has not focused on, much less decided, a federal question in a manner conflicting with a state court of last resort; and it certainly does not constitute a departure from the accepted and usual course of judicial proceedings. See Sup. Ct. R. 10.

In the prior decisions in this litigation both the Fourth Circuit and this Court considered and rejected the Respondent's sole broad public policy argument that his letters to President-Elect Reagan and later President Reagan were enveloped with absolute privilege under the Petition Clause of the First Amendment. Neither Court addressed nor even cited any authority concerning what common law privilege might be available to the Respondent absent a constitutional basis.

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post-trial motions only three statements covering two topics (out of the six pages, 29 paragraphs and 17 topics comprising the two letters) were actually held libelous by the District Court.

Upon remand to the District Court for further disposition, the focus of the action was narrowed to whether an absolute privilege was available to the Respondent under the common law of North Carolina as interpreted by the cases of *Angel v. Ward*, 43 N.C. App. 288, 258 S.E.2d 788 (1979), *Jones v. City of Greensboro*, 51 N.C. App. 571, 277 S.E.2d 562 (1981) and *Holmes v. Eddy*, 341 F.2d 477 (4th Cir. 1965), *cert. denied*, 382 U.S. 892 (1965), *reh. denied*, 383 U.S. 922 (1966). In its carefully considered decision, for which review is now sought, the Fourth Circuit correctly held that under North Carolina common law the Respondent's letters were absolutely privileged because they were written in connection with a quasi-judicial proceeding. The controlling decisions in *Angel*, *Jones* and *Holmes*, *supra*, render the decisions of the Fourth Circuit in the case *sub judice* inescapable and indisputable.

Moreover, there are no federal law or constitutional questions involved at this juncture, those having been disposed of by the Fourth Circuit and this Court in 1984 and 1985.

In final response to the argument that the Fourth Circuit has somehow run afoul of or sinisterly contravened the prior decision of this Court, the Respondent asserts that it is established that a State may accord its citizens more expansive liberties than those conferred by the Federal Constitution. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). Hence, while the Petition Clause of the First Amendment may not have provided the Respondent with all the protection he sought or needed, certainly the State of North Carolina by her common law has done so.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IS NOT ENTITLED TO REVIEW UNDER RULE 10 OF THE RULES OF THE SUPREME COURT.

Rule 10 of the Rules of the Supreme Court of the United States provides in pertinent part:

> "A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10.

There are no special or important reasons for this Court to review the decision of the Fourth Circuit. It does not conflict with another federal appellate court decision; it does not determine (or even address) a federal question in any way at odds with a state court of last resort; and it does not constitute a departure from the accepted and usual course of judicial proceedings. See Sup. Ct. R. 10.1(a)-(c).

Recognizing that he cannot offer a reason of the character identified by Supreme Court Rule 10.1 (a) through (c), as appropriate for review, the Petitioner appears to suggest some sinister plot on the part of the Fourth Circuit to ignore or thwart the prior decision of this Court in this case. However, it is crystal clear that this Court's prior decision focused exclusively on the issue of whether the Respondent was entitled to an absolute privilege under the Petition Clause of the First Amendment. What other privilege might be available to the Respondent was never discussed or decided. The only reference to the common law in this Court's prior decision was in the context of approving the State law respecting the constitutional prerequisite to a recovery of damages and holding that the Petition Clause does not require North Carolina to expand that precondition any further. Succinctly, this Court declared that the Petition Clause does

not *per se* provide *carte blanche* protection for otherwise defamatory statements about public officials.

This same issue was likewise the only one before the Fourth Circuit in 1984 when it also confiningly concluded that the Petition Clause was of no assistance to the Respondent. It is interesting that two of the same Fourth Circuit judges who decided the initial appeal in 1984 rendered the decision now under attack by the Petitioner.[4]

The only prior reference to common law privilege outside the context of the Petition Clause is found in *dicta* of the District Court's Memorandum Opinion of April 28, 1983. See Petition Exhibit G. Thereafter, until the case was remanded by this Court to the District Court, the single issue considered and decided was the Respondent's privilege, if any, under the Petition Clause. It is misleading in the extreme then to state that the "common-law privilege question [was] properly included" in this Court's first examination of the case. See PETITION, page 7. It is equally misleading, at best, to state that "[t]his Court in 1985 settled the question of the . . . . common law privilege applicable to [the Respondent]". See PETITION, page 9.

In 1985 this Court addressed the only issue before it which involved solely the scope of the Petition Clause protection to the Respondent. The present Fourth Circuit decision in no way detracts from, undermines, circumvents or ignores that Opinion. Rather, it simply focused on and decided a different question.

Finally, it is absurd to suggest that since the Court in 1985 resolved the constitutional question presented to it, it also resolved a non-constitutional issue that was not presented to it. There is absolutely no justification for the argument that this Court must have determined that

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[4] Quite clearly, Judges Widener and Russell must have perceived no inconsistency between the decisions.

the Respondent had no dispositive state law defense because otherwise it would not have passed on the Petition Clause issue. The Petitioner, in a desperate last grasp for relief, has read volumes more into this Court's prior decision than actually exists.

The Petitioner has failed to present any special or important reasons for granting the writ and, therefore, it should be denied.

II. THE FOURTH CIRCUIT COURT OF APPEALS DID NOT ERR IN REVERSING THE JUDGMENT OF THE DISTRICT COURT BY CONCLUDING THAT THE RESPONDENT'S WRITTEN COMMUNICATIONS TO THE PRESIDENT-ELECT (AND LATER PRESIDENT) CONCERNING A POTENTIAL CANDIDATE FOR THE POSITION OF UNITED STATES ATTORNEY WERE ABSOLUTELY PRIVILEGED UNDER THE COMMON LAW OF NORTH CAROLINA.

The essence of the Fourth Circuit decision in this case is that the selection and appointment of a United States Attorney by a President (and his support staff) constitute an administrative proceeding during the course of which the President performs a quasi-judicial function, and, therefore, communications made in connection therewith are entitled to an absolute privilege under North Carolina common law. In suggesting that the Fourth Circuit misread and misapplied the governing case of *Angel v. Ward, supra*, the Petitioner disputes that the President is exercising quasi-judicial functions or that there is a "proceeding" involved in the process of choosing a United States Attorney. Hence, a careful analysis of *Angel* is warranted.[5]

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[5] In its 1983 opinion in this case, the District Court construed *Angel v. Ward* as supporting only a qualified privilege with respect to ". . . communications to public officials regarding the fitness of subordinates for public office . . ." 562 F. Supp. at 834. The District Court also acknowledged, however, that *Angel v. Ward* stands for

In *Angel*, the plaintiff, a former Internal Revenue Service agent, brought an action for damages against a certified public accounting firm and its partner (Ward) alleging libel and malicious interference with her employment contract. The facts of the case indicated that the defendant Ward had telephone Mr. William T. Allen, the plaintiff's immediate supervisor, to complain about the manner in which the plaintiff treated his firm's clients and her competence to conduct examinations of tax returns. Allen requested Ward to place his complaints in writing and Ward did so. The plaintiff's job was subsequently terminated and she filed suit, *Angel*, 43 N.C. App. at 289, 258 S.E.2d at 789-90. In his letter, Defendant Ward alleged:

> Mr. Bill Allen
>
> Internal Revenue Service
> Greensboro, NC
>
> Dear Bill:
>
> It is not my usual manner to make a formal presentation of the inadequacies of a person's work . . . . Ms. Angel has examined the tax returns of several of our clients in Greensboro and in Reidsville. Our Reidsville Manager complained of the manner in which she conducted her examination. He expressed concern for the harassment of the client whose tax return was under review. Another partner in our Greensboro office expressed similar concern with respect to his client's treatment at the hands of Ms. Angel. She may not have intended to harass the client, but the vindictive way the questions were ex-

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the proposition that "The [absolute] privilege attending communications made in the course of judicial proceedings has been extended to communications in an administrative proceeding where the administrative officer or agency is acting in a judicial or quasi-judicial function." Id. The District Court did not, however, determine whether the Respondent's letters to the President were sent in connection with a judicial proceeding.

pressed certainly caused adverse reactions on the part of these respective clients and the partners in charge. The Greensboro partner pointed out Ms. Angel's inability to grasp certain fundamental accounting practices.

. . . . Throughout the examination she exhibited an inability to draw an issue to any conclusion that gave any weight to the merits of the client's arguments. This trait, coupled with accusative comments, suggests a type of fear that she would be tricked and that any comments on my part were made only to defer her attention from the questions she had raised. Frequently, I found myself trying to explain to Ms. Angel *routine* accounting entries and the related tax treatment of certain transactions which revealed at least a level of expertise below what one should expect of an Internal Revenue Agent. . . .

The professionalism exhibited by the great majority of Internal Revenue Agents suggests that an exception to the rule should be called to your attention.

Very truly yours,

STRAND, SKEES, JONES COMPANY

/s/ Robert L. Ward
C.P.A., Partner

Angel, 43 N.C. App. at 290-91, 258 S.E.2d at 791 (emphasis in original).

The Superior Court of Forsyth County entered summary judgment in favor of the defendants, who filed an answer asserting as affirmative defenses truth, absolute privilege and qualified privilege. On appeal, the North Carolina Court of Appeals held that the defendants were entitled to an absolute privilege with respect to statements contained in Mr. Ward's letter and affirmed the

trial court's entry of summary judgment for the defendants.

Writing for the court, Judge Erwin (now a United States District Judge) addressed the defendant's entitlement to absolute privilege:

> Had defendants merely mailed the letter to plaintiff's superiors, the communication would have been entitled to a qualified privilege. However, in the instant case, defendants admittedly submitted their letter upon the request of plaintiff's immediate supervisor, who was putting together an evidentiary file to support his superior's decision to terminate plaintiff's employment with the Internal Revenue Service. Defendants contend that this circumstance raises their privilege to the status of an absolute privilege. We agree.
>
> A defamatory statement made in the due course of a judicial proceeding is absolutely privileged. The privilege attending communications made in the course of judicial proceedings has been extended to protect communications in an administrative proceeding only where the administrative officer or agency in the proceeding in question is exercising a judicial or quasi-judicial function.

Angel, 43 N.C. App. at 293, 258 S.E.2d at 791-92 (citations omitted). Judge Erwin continued:

> In Black's Law Dictionary (4th ed. rev. 1968), quasi-judicial is defined as "[a] term applied to the action, discretion, etc., of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature." Id. at 1411. Mr. Allen in his solicitation of defendant's letter was acting for and on behalf of the Internal Revenue Service in a government matter. He was in the process of evaluating plaintiff in connection with her employment. The agency had decided to

> terminate plaintiff's employment, and Mr. Allen was preparing an evidentiary file to support the termination decision. The proceedings was quasi-judicial in nature, and defendant's communications were absolutely privileged.

Angel, 43 N.C. App. at 293-94, 258 S.E.2d at 792. The Court of Appeals concluded that "[a]lthough the Internal Revenue Service administrative procedure for termination or promotion of an employee is quasi-judicial, the quantum of the privilege is the same—an absolute one." *Angel*, 43 N.C. App. at 294, 258 S.E.2d at 792.

The functions being performed by President-Elect Reagan (later President Reagan) and his transition team after the general election of 1980 were identical or at least analogous to the functions determined by the North Carolina Court of Appeals in *Angel v. Ward* to constitute "quasi-judicial functions". Under federal statute, President Reagan was required to appoint (by and with the advice and consent of the Senate) a United States Attorney for each judicial district. *See* 28 *U.S.C.* Section 541 (a) (1982). Both the President and his transition team were "required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as basis for their official action, and to exercise discretion of a judicial nature," *Angel v. Ward*, 43 N.C. App. 293, 258 S.E.2d at 792.

Moreover, there is the unchallenged testimony of McDonald that the impetus for his communication was the televised speech of the President-Elect *soliciting* information and cooperation from American citizens. Misinterpreted or not, McDonald construed Mr. Reagan's remarks as a call for or solicitation to enable it to better serve the public (which included the appointment of competent, qualified federal prosecutors). See *Angel v. Ward* and *Holmes v. Eddy*, *supra*. Accordingly, the Re-

spondent was participating in what was, in essence, the initial stage of a quasi-judicial proceeding.

In attempting to distinguish the controlling cases of *Angel v. Ward* and *Holmes v. Eddy, supra,* Smith asserts that appointing United States Attorneys is not quasi-judicial. As the Fourth Circuit pointed out, such an assertion is hardly persuasive in light of the fact that a nominee for United States Attorney is subjected to a comprehensive FBI and IRS background investigation and, as part of the statutory scheme, is expected to offer sworn testimony before the Senate Judiciary Committee (as well as to respond to specific questions from Committee members) regarding his qualifications, his prosecutorial philosophy, his personal life and conduct and the like. If *Angel v. Ward* and *Holmes v. Eddy* involved quasi-judicial proceedings, as the North Carolina Court of Appeals and the Fourth Circuit both concluded, then surely McDonald was also participating in a quasi-judicial matter when he communicated with President Reagan concerning Smith's lack of qualifications to be United States Attorney.[6]

In conclusion, this Court has long recognized that a State may indeed provide more expansive civil liberties than those found in or conferred by the Federal Constitution. *PruneYard Shopping Center v. Robins, supra,* citing *Cooper v. California,* 386 U.S. 58 (1967). Thus,

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[6] Smith argues that the law of the case prohibits further judicial examination of the question as to whether McDonald's communications were enveloped with absolute privilege. McDonald concedes that his argument on this question had been previously made and rejected by the District Court but respectfully submits that the previous ruling should have been and was reconsidered because the trial court did not have, at that preliminary stage of the proceedings in 1982, the benefit of his testimony regarding the impetus for his communications (i.e., President Reagan's televised speech). Hence, the doctrine of law of the case was and is no bar to reconsideration. *Diaz v. Indian Head, Inc.,* 686 F.2d 558, 562-63 (7th Cir. 1982): 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure Section 478 (1981).

although the Petition Clause furnished no protection to the Respondent, there is no constitutional bar to the North Carolina common law according him absolute privilege of communication in the context of the case at bar. In addition, the possibility that this Court might have arrived at a different conclusion in *Angel v. Ward* and *Holmes v. Eddy* than did the North Carolina Court of Appeals and the Fourth Circuit is insufficient reason to grant discretionary review.

CONCLUSION

For the reasons stated above, a writ of certiorari should be denied. Respondent respectfully requests an award of his attorney's fees and costs expended herein under the provisions of Sup. Ct. R. 49.2 on the ground that the Petition for Writ of Certiorari is frivolous. Under the authority of footnote 3 of this Court's decision in 1985, 472 U.S. 482 (1985) Respondent also respectfully requests an Order directing reimbursement of all costs and attorney's fees expended by him in the defense of this action.

Respectfully submitted,

WILLIAM WOODWARD WEBB
BROUGHTON, WILKINS
& WEBB, P.A.
P.O. Box 2387
Raleigh, NC 27602
(919) 833-2752
Counsel for Respondent